No. 10,501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY DICKINSON (his wife), WILLIAM KEMP, and L. K. FEREVA, individually and doing business under the firm name and style of "Fereva Chevrolet Company",

Appellants,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD.,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Three separate briefs have been filed by appellants herein and the points made are substantially the same in them all. We file this reply brief in answer to the three.

Summarizing appellants' points they seem to be two in number, first, that appellants were improperly deprived of a jury trial; second, that the evidence does not support the findings made by the court.

THIS CAUSE IS WITHIN EQUITY JURISDICTION AND COURT PROPERLY HELD VERDICTS ADVISORY.

Our position with respect to the first point is that this was a suit in equity in which the verdict of the jury was purely advisory. Plaintiff's complaint was filed on the equity side of the court. It sought a declaration of its rights and duties under the policy, also the avoidance of a multiplicity of actions and the obtaining of an injunction against defendants. The actions which concerned plaintiff were five in number: (1) The action of Dickinson against Fereva in which judgment had been rendered in the state court; (2) The defense in the state court of the action of Kemp against Fereva. In each of these the question of the duty of the insurer to defend was involved. There were also a threatened action by Mr. and Mrs. Dickinson against plaintiff upon its policy; another by Kemp in the event he recovered a verdict in the state court, also against the insurer on its policy; and the last one an action by Fereva on the policy to recover his legal expense, attorney's fees, and such sums as he might pay in partial or entire satisfaction of the judgments. In each of these problems the sole point at issue was whether or not Fereva gave timely notice of the happening of the accident as required by condition 7 of the policy.

Answer was filed by the defendants Dickinson and Kemp, consisting of denials and a claim that the plaintiff was estopped by having defended the Dickinson action without reservation of its rights and a cross-claim was filed seeking affirmative relief.

These were the issues involved when the taking of evidence began on December 22, 1941. At that time further equitable issues were presented by the filing of amendment to answer by the Dickinsons and Kemp and seeking affirmative relief, setting out that the plaintiff was estopped from claiming the benefit of condition 7 of its policy and from setting up the same as a defense.

Upon the trial of the case Fereva testified that he gave no written notice of the happening of the accident until the 26th of April, 1940, 60 days after its occurrence. He also testified that he had received notice of reservation of rights from the plaintiff by registered mail in both the Dickinson and Kemp cases.

From that point on the time of the court was consumed by efforts to show estoppel on the part of the plaintiff. The jury returned its verdicts in favor of the defendants.

Thereupon on motion of Mr. Goldstein, representing the defendants and cross-claimants, it was ordered that findings of fact and conclusions of law and judgment be prepared by Mr. Goldstein, with leave to plaintiff to file amendments, same to be thereafter settled by the court. Thereafter Mr. Goldstein submitted to the court proposed findings, moving that the same be signed and filed. (Tr. 43, 420-21.) These proposed findings and a proposed judgment and decree are found at transcript pages 45 and 74. Defendants sought the adoption of the verdicts by the judge.

This conduct on the part of the defendants created as we contend an equitable estoppel as a result of which the defendants who took this position with regard to procedure, which was acted and relied upon by the court, are estopped from taking an inconsistent position.

31 *C. J. S.,* Title "Estoppel", p. 380, Sec. 118.

The court held the verdicts to be purely advisory, and that they should not be adopted (Tr. 40), and signed findings and judgment in favor of the plaintiff and cross-defendant, refusing to adopt the verdicts. (Tr. 87 and 98.)

Up to that time and until the court rendered its decision in favor of the plaintiff and cross-defendant, and signed findings and judgment in its favor, the whole case was treated as a suit in equity. (See recognition of legal and equitable issues at transcript page 398.)

Nowhere at any time between the filing of the original conplaint and the signing of the findings, was any question raised as to the nature of this suit as one in equity, as to whether it was a proper cause for an injunction, or as to whether it was properly brought to avoid multiplicity of actions. None of the parties at any time asked the court to separate the legal and equitable issues, to try the equitable before the legal, or to try some to the court and others to the jury. The question of constitutional right to a jury trial was not even suggested by defendants and cross-claimants until their petition and motion for new trial, which appears at transcript page 102.

It being entirely discretionary with the court to grant a new trial, a refusal to grant cannot be assigned as error and is not reviewable unless an abuse of discretion is apparent.

Here the ruling on motion for new trial is not presented for review in defendants' and cross-claimants' "Statement of Points on Appeal". (Tr. 423.)

The court having disposed of the equitable issues in favor of the plaintiff, and having found that the plaintiff was not estopped to defend because of want of notice required by condition 7 of the policy, either by having waived the same or by having undertaken the defense without reservation of rights, there was no issue left to be submitted to a jury as Fereva conceded that he gave no written notice prior to 60 days after the happening, and that the steps taken by plaintiff insurance carrier were all under full reservation of its rights. No evidence to the contrary was offered in the entire record.

Fairmont Glass Works v. Cub Forks Coal Co., 287 U. S. 474, 77 Law Ed. 439;

Holmgren v. U. S., 217 U. S. 509, 521, 54 Law. Ed. 861, 19 Anno. Cases 778;

Latchtimaker v. Jacksonville Towing & Wrecking Co., 181 Fed. 277.

The right of trial by jury of legal issues in an action attaches only if such issues remain after trial of the equitable issues.

Fitzpatrick v. Sun Life Assur. of Canada, 1 F. R. D. 713, 717.

A court of equity will take cognizance of a controversy to prevent a multiplicity of suits, although the exercise of such jurisdiction calls for adjudication on purely legal rights, and confers purely legal relief. The formula has been stated as follows:

> "An adequate remedy at law does not exist where a multiplicity of actions are required to obtain complete relief."
>
> *Oelrichs v. Spain (Oelrichs v. Williams),* 15 Wall. 211, 227, 21 L. Ed. 43, 44;
>
> *Wyman v. Bowman,* 127 Fed. 257;
>
> *Camp v. Boyd,* 229 U. S. 530, 552, 57 L. Ed. 1317, 1327, 33 S. Ct. 785;
>
> *McGowan v. Parish,* 237 U. S. 285, 291, 59 L. Ed. 955, 961, 35 S. Ct. 543;
>
> *Graves v. Texas Co.,* 298 U. S. 393, 80 L. Ed. 1236, 56 S. Ct. 818, and cases cited.

When equity has rightfully obtained jurisdiction, it will grant complete relief even though incidentally there may be an aspect of the case which, taken alone, might be of a legal character rather than equitable. In such instance equity may grant complete relief without violating the Seventh Amendment with respect to jury trial. Under such circumstances the whole case becomes one of equitable cognizance without a right of trial by jury.

> *Liberty Oil Co. v. Condon,* 260 U. S. 235, 244, 67 L. Ed. 232, 236, 43 S. Ct. 118.

New civil procedure rules 38 and 39 do not affect the ancient rule of equity jurisprudence but merely preserve the right to trial by jury as it formerly

existed and do not extend that right if the jury was not formerly required.

An injunction is proper in a suit to obtain declaratory relief and avoid multiplicity of actions.

First State Bank v. Chicago R. I. & P. R. Co., 63 Fed. (2d) 585, 90 A. L. R. 544;

Standard Accident Ins. Co. v. Grimmett (D.C. La.), 32 Fed. Supp. 81;

Standard Accident Ins. Co. v. Alexander (D.C. Tex.), 23 Fed. Supp. 807;

American Life Ins. Co. v. Stewart, 300 U. S. 203, 81 Law Ed. 605, 111 A. L. R. 1268;

New York Life Ins. Co. v. Truesdale, 79 Fed. (2d) 481;

Commonwealth Trust Co. v. Bradford, 297 U. S. 613, 80 Law. Ed. 920, at pp. 924-5;

Maryland Casualty Co. v. Tighe, 24 Fed. Supp. 49, 29 Fed. Supp. 69;

Continental Casualty Co. v. National Household Distributors, 32 Fed. Supp. 849;

Central Surety & Ins. Co. v. Caswell (C.C.A. 5), 91 Fed. (2d) 607.

Where an equitable defense is interposed the equitable issue should first be disposed of as in a court of equity.

Smith Engineering Co. v. Pray, 61 Fed. (2d) 687.

As the court says in

Rust Engineering Co. v. Lehigh Structural Steel Co., 79 Fed. (2d) 830, at p. 831:

"Our conclusion is that appellant, in filing its equitable defense and thus invoking the powers of a court of equity and then presenting evidence in support of its legal defense on the trial, has waived its constitutional right to a trial of the legal issue by a jury. When, without objection, it proceeded to a trial of the entire issue before the court, it waived the right to demand a jury trial. See American Mills Co. v. American Surety Co., 260 U. S. 360, 43 S. Ct. 149, 67 L. Ed. 306; Reynes v. Dumont, 130 U. S. 354, 9 S. Ct. 486, 32 L. Ed. 934; Smith Co. v. Pray (C.C.A.), 61 F. (2d) 687; General Felt Products, Inc. v. Saranac Co. (C.C. A), 61 F. (2d) 857."

A case that presents some points of similarity to the one at bar is

Hargrove v. American Cent. Ins. Co., 125 Fed. (2d) 225,

from which we quote at page 228;

"If the issues tendered are purely equitable, the court has the indisputable right under the civil rules of procedure to call a jury in an advisory capacity of its own initiative and to submit to them such issues of fact as he sees fit, and to accept or disregard its verdict thereon in his discretion. Or the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. Rule 39 (c).

"If the issues tendered by the pleadings are purely legal, the parties are entitled to a jury as of right, rule 38 (a), when demanded as provided in rule 38 (b) (c). If no demand is made as provided for in subdivisions (b) and (c), the parties are deemed to have waived the right of trial by

jury, but the court may in its discretion, upon motion of either party, order a jury trial of any or all issues, notwithstanding waiver under 38 (b) (c), but may not order trial by jury on its own initiative. 3 Moore Federal Practice, 3030, sec. 39.03."

And at page 229:

"But the insured had only the right to insist that the cause be submitted to and tried by the court, without the advice of a jury, and that is exactly what he received. The court wholly disregarded the verdict of the jury, made its independent findings and conclusions on which its judgment is based. The verdict of the jury is no part of his judgment. The insured not only consented to the procedure, but he is not prejudiced thereby and cannot now complain. See (American) Lumbermen's Mutual Casualty Co. of Illinois v. Timms & Howard, Inc., supra."

In

(American) Lumbermen's Mutual Cas. Co. v. Timms & Howard, 108 Fed. (2d) 497,

it appears that the trial procedure was somewhat irregular, or odd as the opinion expresses it. There were legal and equitable issues framed by the pleadings, but the equitable ones presented by the defendant were not tried. However, it was held that the parties with the approval of the judge could agree that an advisory verdict be taken as in equity, and with the same weight that such a verdict had in equity, and that the court had discretion to set aside such verdict, which discretion was not reviewable.

Equitable defenses interposed by answer, plea or replication are to be tried by the judge as a chancelor, and if the equitable issue having been disposed of there remains an issue at law it may be tried by a jury.

Enelow v. New York Life Ins. Co., 293 U. S. 379, 79 Law Ed. 440;

Liberty Oil Co. v. Condon Bank, 260 U. S. 235, 67 Law Ed. 232;

American Mills Co. v. American Surety Co., 260 U.S. 360, 67 Law Ed. 306;

Kneberg v. H. L. Green Co., 89 Fed. (2d) 100.

Recourse to equity by the plaintiff was justified in this case by the decision in

American Life Ins. Co. v. Stewart, 300 U. S. 203, 81 Law Ed. 605, 111 A. L. R. 1268.

EVIDENCE IS SUFFICIENT TO JUSTIFY FINDINGS AND JUDGMENT.

The position taken by appellants other than Fereva that since they are strangers to the contract, since they have sustained injuries and suffered loss through Fereva's conduct they should have the right to recover on the policy of insurance irrespective of any question as to whether Fereva gave timely notice of the happening of the accident, is clearly untenable. The law is thoroughly settled that the right conferred by statute upon an injured person who has secured judgment against the insured to bring an action against an insurance company on its policy is "sub-

ject to its terms and limitations''; that the effect of this statute is to give to an injured claimant a cause of action against an insurer for the same relief that would be due to a solvent insured seeking indemnity and reimbursement after judgment had been satisfied by him. The cause of action is no less, but also it is no greater; insured and claimant must abide by the conditions of the insurance contract. It necessarily follows that if Fereva failed to give written notice as required by condition 7 of the policy of insurance, and forfeited his right to claim indemnity under the policy, the appellants who are cross-complainants likewise lost any right they might otherwise have had under the policy, as Mr. and Mrs. Dickinson and Mr. Kemp stand in no better position than the insured Fereva.

California Statutes 1919, page 776, embodied in California Insurance Code 11580.

An injured person's right of action against an insurer under an automobile policy is dependent upon the provisions of the insurance contract as a whole, and he can acquire no greater right thereunder than that existing in favor of the insured.

Fireman's Fund Indemnity Co. v. Kennedy, (C.C.A. 9), 97 Fed. (2d) 882.

IN CALIFORNIA NOTICE OF ACCIDENT MUST BE GIVEN WITHIN 20 DAYS.

Immediate notice of the accident is a condition precedent to recovery upon the insurance policy. In

Fireman's Fund Indemnity Co. v. Kennedy, supra,

it is held that a delay in giving notice of the accident from December 8, 1933, to February 5, 1934, that is for a period of 59 days, constitutes a violation of the terms of the policy and released the insurer. See also

Royal Indemnity Co. v. Morris (C.C.A. 9), 37 Fed. 90, at p. 92;

Purefoy v. Pacific Auto Indemnity Exchange (1935), 5 Cal. (2d) 81, 53 Pac. (2d) 155.

The matter of time within which notice should be given is regulated by statute in the State of California in

Section 551, Insurance Code of the State of California,

wherein it is provided as follows:

> "Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a lesser period shall be valid."

If, therefore, 60 days elapsed after the happening of the accident, and before the giving of notice to the company by Mr. Fereva, such delay constituted a breach of the contract prejudicial to the insurer as a matter of law, and the failure to comply with this term of the insurance policy constitutes a complete defense to any action based thereon against the

insurer whether brought by the insured Fereva or by the injured persons.

Distributors Packing Company v. Pacific Indemnity Company (1937), 21 Cal. App. (2d) 505, 70 Pac. (2d) 253;

Coolidge v. Standard Accident Insurance Company (1931), 114 Cal. App. 716, 300 Pac. 885;

Insurance Code, Section 551, formerly Civil Code Section 2633-A.

That the provision of the policy requiring immediate notice is a valid provision and substantial compliance with it was a condition precedent to the right to recover under it, see

Clements v. Preferred Accident Insurance Co. of New York (C.C.A. 8), 41 Fed. (2d) 470;

St. Louis Architectural Iron Co. v. New Amsterdam Casualty Co. (C.C.A. 8), 40 Fed. (2d) 344.

Identical in principle is the case of

Royal Indemnity Co. v. Morris (C.C.A. 9), 37 Fed. (2d) 90,

and also

Metropolitan Casualty Ins. Co. v. Colthurst (C.C.A. 9), 36 Fed. (2d) 559.

A delay of 72 days was fatal to recovery in

Travelers Insurance Co. v. Nax (C.C.A. 3), 142 Fed. 653.

For further illustrative cases see

New Jersey Fidelity & Plate Glass Ins. Co. v. Love (C.C.A. 4), 43 Fed. (2d) 82;

Sawyer v. Travelers Ins. Co. (D.C.Va.), 10 Fed. Supp. 848.

That a reasonable time is deemed to be *within 20 days* from the happening of the accident, see

Coolidge v. Standard Accident Insurance Co., 114 Cal. App. 716, 300 Pac. 885.

In the following authorities, involving no more delay than the 60 days intervening in the instant case, there was held to be a breach of the condition *as a matter of law.* It will be observed that in all the cases now cited, either the trial court directed a verdict in favor of the defense, with the ruling sustained on appeal, or judgment in favor of the plaintiff was reversed, with the direction to enter judgment in favor of the defendant insurance company. There can thus be no doubt that each of the delays specified was adjudicated a fatal one *as a matter of law.* In connection with each citation, we point out the time involved:

Lewis v. Commercial Casualty Ins. Co. (Md. 1923), 142 Md. 472, 121 Atl. 259 (42 to 45 days);

Hagstrom v. American Fidelity Co. (Minn. 1917), 137 Minn. 39, 163 N.W. 670 (52 days);

Smith & Dove Mfg. Co. v. Travelers Ins. Co. (Mass. 1898), 171 Mass. 357, 50 N. E. 516 (27 days);

Rooney v. Maryland Casualty Co. (Mass. 1903), 184 Mass. 26, 67 N. E. 882 (22 days);

McCarthy v. Rendle (Mass. 1918), 230 Mass. 35, 119 N. E. 188 (15 days);

Haas Tobacco Co. v. American Fidelity Co. (N.Y. 1919), 226 N. Y. 343, 123 N. E. 755 (10 days);

Gullo v. Commercial Casualty Ins. Co. (1929), 235 N. Y. Supp. 584 (13 days) (The question of waiver, only, was held open for the jury, at a further trial);

Commercial Casualty Ins. Co. v. Fruin-Colnon Cont. Co. (C.C.A. 8, 1929), 32 Fed. (2d) 425, 429 (53 days);

Rushing v. Commercial Casualty Ins. Co. (N.Y. 1929), 251 N. Y. 302, 167 N. E. 450 (22 days);

Cal. Civil Code, Sec. 2633-2, now embodied in Cal. Ins. Code, Sec. 551.

TWOFOLD OBLIGATION RESTED ON FEREVA AS AGENT AND INSURED.

In analyzing the duty of Fereva as an insured under the policy we respectfully suggest that the fact that Fereva occupied a dual position should be borne in mind at all times. In the first place Fereva was an agent of the plaintiff corporation. As such in dealing with third persons on behalf of the principal and in matters within the scope of his authority *what he did and what he learned as such agent* might be imputable to his principal. Fereva himself testified that he was merely a soliciting agent; that he did not issue or sign policies and had no authority to do so. (Tr. 151, 154-155.)

However, as Mr. Wentz testified the Insurance Department used but one form of license. (Tr. 237-8.) The license itself is in evidence. (Tr. 152-154.) And

our courts have held that so far as the public *with whom he was dealing as agent* was concerned one acting under that form of license should be considered a general agent of the company in making contracts of insurance on its behalf.

Bankers Indemnity Ins. Co. v. Pinkerton (C.C. A. 9), 89 Fed. (2d) 194, 198.

This rule is modified and a distinction drawn between the apparent authority of such an agent and the actual authority. Or in other words the question presented concerns the true relationship existing between the principal and agent. See

Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613, 60 Law Ed. 1202.

However, this case does not involve any question of consummating a contract with the Dickinsons, Kemp or any other person.

This case does involve in part the general duty of Fereva as an agent of the company to communicate to his principal information received by him relating to the business of his principal. It is elemental that honor and good faith called upon him to advise his principal of matters coming to his attention which affect the principal. See

2 *Corpus Juris,* "Agency", p. 714, Sec. 369;
Duff v. Duff, 71 Cal. 513, 12 Pac. 570.

Going a step further in the analysis it is the rule that the knowledge of an agent is not imputed to the principal where the agent is engaged in a transaction in which his interests are adverse to those of the prin-

cipal. To quote the language of the late Judge Bourquin in

Fulkerson v. National Union Fire Ins. Co., 291 Fed. 784, at 787,

wherein the agent was at the same time an insured.

> "It is unnecessary to more than recall that in contracts betwen principal and agent, the notice, knowledge, and possession solely of either is not imputed to the other.
>
> "The virtue of this settled law is strikingly illustrated by the instant case. If the uncommunicated application is effective as a contract, it could be the instrument of fraud—to be communicated if hail and damage rendered profitable; to be withheld if not. And in like circumstances to be falsified in date and to incite to perjury."

A principal is not charged with knowledge of his agent where the agent deals for himself with the principal, as is the case here where an insured under the policy is at the same time an agent of the company.

Dull v. Royal Ins. Co., 159 Mich. 675, 124 N. W. 533.

This is true in agency generally.

Harrison State Bank v. United States Fidelity & Guaranty Co. (Mont.), 22 Pac. (2d) 1061, 1064;

3 *Corpus Juris Secundum,* Sec. 269, pp. 202-3;

Bombace v. American Bauxite Co. (C.C.A. Pa.), 39 Fed. (2d) 867;

Ohio Millers' Mutual Ins. Co. v. Artesia State Bank (C.C.A. Miss.), 39 Fed. (2d) 400;

In re L. Van Bokkelen, Inc., 7 Fed. Supp. 639, affirming *Royal Baking Powder Co. v. Hessey,* 76 Fed. (2d) 645, certiorari denied *Lowendahl v. Hussey,* 56 S. Ct. 110;

Kean v. National City Bank (C.C.A. Tenn.), 294 Fed. 214, petition dismissed 44 S.Ct. 179, 263 U.S. 729, 68 L.Ed. 528;

Pine Mountain Iron etc., Co. v. Bailey (Minn.), 94 Fed. 258, 36 C.C.A. 229;

Witty v. Clinch, 279 Pac. 797, 207 Cal. 779; Id. 279 Pac. 799, 207 Cal. 798;

Herdan v. Hanson, 189 Pac. 440, 182 Cal. 538;

Carlisle v. Norris, 109 N.E. 564, 215 N.Y. 400, Ann. Cas. 1917-A 429, affirming 142 N.Y.S. 393, 157 App. Div. 313.

FEREVA'S REPORTS OF ACCIDENT TO HIS INSURED CLIENTS ARE NOT IN POINT.

On the trial of this case over the objections of the plaintiff and respondent a great deal of detailed evidence was introduced showing (1) that Fereva had sold a certain number of policies of insurance for the plaintiff company, and (2) that upon learning of accidents occurring to various insureds to whom he had sold policies he had in turn notified Urquhart orally or by telephone of the occurrence of the accident. In all of these cases, as will appear from an examination of the exhibits and transcript, Fereva did simply what it was his duty to do as an agent licensed by the Insurance Department to act for the plaintiff company.

But in none of these cases does the evidence show that he as an insured made such oral report, and as an insured gave no written notice personally or by agent. Urquhart testified "I don't believe we ever paid a loss for Mr. Fereva." (Tr. 315.)

We refer to the transcript as illustrating the confusion in the evidence brought about by the irrelevant excursion into the field of Fereva's activity in cases where accidents occurred to insureds for whom he had secured policies. The first question propounded to him by defense counsel dealt with "losses in connection with any policies issued to you *or your clients"*, and again "any accident or loss to yourself *or clients"*; and "how many accidents you had *or your clients had."* (Tr. 322.)

Fereva himself shows his confusion in asking: "My own, personally, or any of them? Mr. Goldstein: Q. Any of them. A. Many of them. Q. How many, Mr. Fereva? A. A dozen or fifteen, the persons I had insured." (Tr. 323.)

Fereva then states that there were several of his own and then enumerates them as follows: "A. Yes; one of my salesmen, Mr. Smith; a prospective buyer by the name of Mr. Clark; Mrs. Christianson; at one time I had a partner by the name of Gianachi". (Tr. 323.) But here is where this inadmissible testimony is exceedingly misleading. As appears from the transcript, pages 255-6, Mrs. Christianson was an insured under a policy of her own. So was James R. Smith. (Tr. 252.) Mr. Fereva testified "We placed insurance for

our mechanic who had a car that was in a wreck." (Tr. 344.) As to Mr. Clark, "the prospective buyer", and as to Gianachi, the evidence does not show whether they did or did not have policies of their own, and whether if they did such policies were with the General Accident or with some other carrier with which Wentz & Erlin were not concerned.

Furthermore, there is no showing whatever made by the defendants that the persons with respect to whom he reported accidents did not themselves within the policy period give the written notice that they were required to give. Such notice by the nature of things was given in writing by or on behalf of the insured, or the additional insured, and naturally would be given by the one of them coming under the general term "insured" who was actually involved in the accident and acquainted with the facts.

Of course the inter-office communication made by one agent to another agent, whether the latter's authority was greater or less than the one communicating, is in no sense whatever governed by condition 7 of the policy of insurance which prescribes the duty of an insured. The policy provides in insuring agreement III:

> "Definition of Insured. The unqualified word 'insured' wherever used includes not only the named insured but also any partner thereof, if the named insured is a partnership, or any executive officer thereof, if the named insured is a corporation, provided such partner or officer is active in the declared operations". (Tr. 125.)

If there ever was a policy issued by the General Accident covering a partnership of which one Gianachi was a partner, it certainly does not appear in the evidence. Fereva says "At one time I had a partner named Gianachi". If by that he meant that Gianachi had an accident again the record is silent as to whether Gianachi made a written report. Judging from Fereva's testimony every time an accident happened and it came to his attention that an insured for whom he had procured a policy was involved, he promptly notified Urquhart by telephone or in personal conversation; that thereafter the matter was attended to with exceptional promptness. But Fereva does not in his testimony even endeavor to state that the various insureds involved in such accidents did not with due promptness render a written statement and give the information made essential by condition 7 of the policy.

A significant part of Fereva's testimony with reference to giving written reports is found in the transcript, page 332, where in response to the question of Mr. Goldstein he says: "Q. Did you ever file a written report to Mr. Urquhart? A. I don't know of any. *Very few, if any*".

In this connection may we respectfully point out that the Supreme Court of California has explicitly set out reasons why a written notice in compliance with the terms of the policy is essential. In

Purefoy v. Pacific Auto Indemnity Exchange,
5 Cal. (2d) 81, 53 Pac. (2d) 155,

the court says at page 88 of the official report:

"There are decisions holding that the requirement for notice may be satisfied by notice given by the injured person. (See annotation. 76 A.L.R. 38, citing cases.) But in the instant case, the notice was not given promptly after the accident by the injured person. Notice given three and a half months after the accident, especially when it is considered that the notice given at that date was not from the insured, but from the injured person, who was an adverse party, was not reasonably prompt notice, and did not constitute a compliance with the policy. (Coolidge v. Standard Acc. Ins. Co., 114 Cal. App. 716, 300 Pac. 885; Los Angeles Athletic Club v. United States Fidelity & Guar. Co., 41 Cal. App. 439, 183 Pac. 174; Aronson v. Frankfort etc. Ins. Co., 9 Cal. App. 473, 99 Pac. 537.) The information communicated to the insurer three and a half months after the accident otherwise failed to comply with the policy. It contained the bare statement that a named policy holder had been in an accident, without stating even the time and place of the accident. It did not state the 'names and addresses of all witnesses to the accident', as required by the policy, nor the 'conditions surrounding the happening' of the accident.

"The insurer was deprived of an opportunity to make a prompt investigation while the facts were fresh in the minds of the parties and witnesses, and before physical marks and effects of the accident had been obliterated. As to certain breaches of condition it may more readily be shown whether prejudice had resulted therefrom. But respondent argues with convincing force herein, that the lapse of time which removes the opportunity for prompt investigation, also destroys the

possibility of showing prejudice arising from delayed inquiry. Where witnesses are interviewed after lapse of time, during which they either may have forgotten the facts, or been approached solely by representatives of the injured party, it virtually becomes impossible to learn what facts, favorable to defendant could have been ascertained through prompt inquiry. We are impelled to the conclusion that prejudice must be presumed in such situations.''

In the case now before this honorable court the evidence shows that the insurer was deprived of all the opportunities that it should have had, for example, examination of the cars involved, of witnesses while the facts were fresh in their minds, the physical marks before the effects of the accident had been obliterated, opportunity to negotiate settlement before enmity arose between the parties, checking the nature and extent of the injuries; in fact it was impossible sixty days thereafter to ascertain many of the elements favorable to defendant. With most of this Fereva in his testimony frankly agrees.

So far we have discussed the duties of Fereva arising out of his position as agent, and those duties (a) with reference to the public, and (b) with reference to the communication of information to his principal concerning accidents occurring to cars to cover which the agent procured insurance, and also the general duty of the agent in loyalty and good faith to inform the principal of things which concern it.

IMPUTABILITY TO INSURER OF AGENT'S KNOWLEDGE, NOTICE OR CONDUCT WHERE THE POLICY COVERS THE AGENT'S PROPERTY.

One of the best summaries of the rule we find in the note contained in

83 A. L. R., at page 1525,

where the editor states:

"Ordinarily at least, an insurance agent, in issuing a policy covering his own property, or in making application for such a policy subsequently issued by the insurer, does not act as or stand in the relation of the insurer's agent. This is an incident to, if not essentially a part of, the general rule announced supra, subd. II, and illustrated and applied both therein and in other preceding subdivisions; as such, it is recognized throughout the cases, in the great majority of them without statement or discussion; at this time and place, therefore, no general collection of the cases supporting the proposition will be made. It is equally true, it seems, upon both principle and authority, that at no time during the life of the policy does said agent act as or stand in the relation of the insurer's agent, as regards the policy and the property thereby covered."

"Weatherholt v. National Liberty Ins. Co. (1924), 204 Ky. 824, 265 S.W. 311 (declaring that the general rule on the subject is that an insurance agent 'cannot as agent act for the company in procuring and writing fire insurance on his own property, for in such case he acts both for himself and the company').

"Zimmermann v. Dwelling-House Ins. Co. (1896), 110 Mich. 399, 33 L.R.A. 698, 68 N.W. 215 (declaring that an agent for receiving applica-

tions 'ceases to be an agent so long as he acts in a matter in which his personal interest is concerned', and that, if he applies for insurance on his own property, 'as to that property he is no agent of the company').

"Dull v. Royal Ins. Co. (1910), 159 Mich. 671, 124 N.W. 533 (declaring that it seems to be settled law that, if an agent is personally interested in the property insured, no policy issued by him, 'or act done by him in connection therewith,' binds the insurance company unless known and assented to by it).

" 'In contracts between principal and agent, the notice, knowledge, and possession solely of either is not imputed to the other.' Fulkerson v. National Union F. Ins. Co. (1923; D.C.D. Mont.), 291 Fed. 784."

Contention is made by appellants' counsel that there was a waiver of written notice by the plaintiff company. This, however, is not established by the record. When pinned down to concrete cases Fereva was able to give no instance whatever in which he as an insured had given oral notice to Urquhart of a loss under a policy issued by the General Accident to himself as an insured, as distinct from policies issued to others with reference to which he was a soliciting agent. Fereva could not as an agent of the company waive the performance of his own duties as an insured under the policy. He could not claim that the company had notice of his own claim because he knew about it, where both as agent and as insured it was his clear duty to convey the information to the company.

Urquhart on the other hand was not an agent of the General Accident, but was the district representative of Wentz & Erlin, who were general agents for a number of companies, writing business in miscellaneous lines. The handling of claims for the General Accident was clearly without his authority. (See the testimony of both Mr. Wentz (Tr. 194-5) and Mr. Urquhart (Tr. 315-7).

The policy provided under section 12, as follows:

> "No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the corporation from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the United States Manager." (Tr. 133.)

An insurance company, like any other principal, may limit the powers of its agents. Where this is done by clear and plain terms in the policy and the applicant accepts the policy, it becomes the contract between him and the company and he is charged with knowledge of its terms, among others, the limitations upon the power of the agent of the company. The authority of an agent to effect a waiver in the face of a limitation denying his power to waive warranties or conditions is not vested in every agent who may represent the company. Unless such authority be given to some particular agent to do so, then, as a general rule, it is only agents of the company who are empowered to issue and deliver policies that may be

regarded as having the power to waive conditions and forfeitures. As to the character of agents authorized to waive such conditions, the rule includes all persons empowered to conclude contracts of insurance without first referring the negotiations to their principals, such as those which have full power to effect contracts of insurance, to fix rates of premiums, to consent to changes, to make indorsements and to cancel policies.

Porter v. General Acc. etc. Assur. Corp., 30 Cal. App. 198, 157 Pac. 825;

Iverson v. Metropolitan Ins. Co., 151 Cal. 746, 13 L.R.A. (N.S.) 866, 91 Pac. 609;

Sharman v. Continental Ins. Co., 167 Cal. 117, 124, 52 L.R.A. (N.S.) 670, 138 Pac. 708;

Enos v. Sun Ins. Co., 67 Cal. 621, 8 Pac. 379.

The most recent case on the subject in our federal courts which we have been able to find, and the facts of which are much stronger for the appellants herein than are the facts in this case, holds that nevertheless there is no waiver or estoppel where nothing is done by the insurance company to lead the insured to believe that he need file no notice as required by the policy. We refer to

Alexander v. Standard Accident Insurance Co. (C.C.A. 10), 122 Fed. (2d) 995.

This ruling is in conformity with the holding in

Peoples Bank of Greeneville v. Aetna Ins. Co. (C.C.A. 4), 74 Fed. 507;

Bakhaus v. Germania Fire Ins. Co. (C.C.A. 4), 176 Fed. 879;

Kansas City Life Ins. Co. v. Davis (C.C.A. 9), 95 Fed. (2d) 952, 957.

In the case at bar there is no showing that Urquhart or anybody else did or said anything whatever within the 60 days following the happening of the accident that would lead or tend to lead Fereva to believe that the giving of a written notice was waived. In fact on that topic he testified (Tr. 340): "Q. At that time Mr. Urquhart made no reply to you? A. No. As I said, our conversation was interrupted. Q. And you had known for some 14 years that Mr. Urquhart was a very deaf man? A. Yes, I had talked with him, yes."

Thereafter, up to December 5, 1941, he never mentioned the subject of notice to Urquhart although both his testimony and that of Urquhart shows that the latter saw him on an average of probably twice a month.

While on this subject we would also call this honorable court's attention to the fact that the label, the subject of so much anxiety on the part of counsel for the appellants, was not attached to or made a part of the policy of insurance with reference to which this action is brought. (See stipulation, Tr. 148-9.) And it does not by its terms purport to waive notice in writing, and even had it been upon this policy the most that could be said in favor of appellants' contention is that notice in writing as required by the policy might have been give to Urquhart for the company.

Passing now to the question as to whether the evidence shows that Fereva gave even an oral notice to Urquhart that might be deemed a compliance with section 7 of the policy, there are many things appear-

ing against him. These we will try to summarize briefly.

EVIDENCE WARRANTS FINDING FEREVA GAVE NO NOTICE WHATEVER PRIOR TO 60 DAYS.

First: As we have just shown by an excerpt from his testimony, Fereva knew for 14 years that Urquhart was very deaf. (Tr. 340.) He admits that when he claims to have spoken to Urquhart the latter did not reply. He does not claim to have spoken to him in any tone of voice above the ordinary, and Fereva's voice was so low on the witness stand that both the trial judge and his own counsel admonished him "to speak a little louder". (Tr. 328.) The brief statement claimed to have been made to Urquhart was the whole conversation. He did not ask Urquhart to do anything about it. "I just reported to him." "Our conversation was interrupted at that time." (Tr. 338-9.) "The conversation wasn't completed".

We suggest to this honorable court that this does not constitute giving notice to the plaintiff, this alleged talk to a very deaf man. Courts have frequently considered the effect of deafness where one party endeavors to bind the opposite party by some statement made in his presence or in the presence of his agent. In

> *Wright v. Tatham,* 5 Clark & Finnelly 670, 722 (7 House of Lords, English Reports Reprint, p. 559 at 578),

the rule is expressed by Baron Alderson as follows:

"* * * I agree that conversation addressed to Mr. Marsden, or conduct towards him, would have been evidence if he were shown to be cognizant of it. But why? Because it explains and illustrates his conduct—which is in effect an act done by him—in hearing the one and receiving the other. His manner at the time—even though he made no answer—would be proper to be left to the jury. But a letter is like a conversation in which you have no such accompanying conduct to be explained or illustrated. It is like conversation addressed to a man when asleep or intoxicated, or *which he did not hear;* or conduct towards him in his absence; which would not be admissible."

In

Parulo v. Philadelphia & R. Ry. Co., 145 Fed. 664, at 668, to 672,

the situation is thoroughly discussed and many authorities cited, the court saying at page 669:

"If the party in whose presence the statement was made was physically and mentally able to hear and understand, and sufficiently near to hear, and the statement was of a character that would under the circumstances naturally call upon him for a denial or qualification if untrue, and he was at liberty to deny or qualify, then it may be given in evidence against him; otherwise, not."

The same situation is referred to in

Henderson v. Northan, 176 Cal. 493, 497, 168 Pac. 1044.

And again in

Smith v. Smith, 173 Cal. 725, 732, 161 Pac. 495,

where, however, very loud tones were used by the speaker.

Devonshire v. Stubbs, 238 N.Y.S. 707, 135 Misc. 886.

And that the court will take notice and pay regard to the improbability of a person's hearing, see

Ramsay v. Ryerson, 40 Fed. 739.

On the other hand Urquhart flatly denies that Fereva ever made such statement to him. (Tr. 319-320.)

Weighing the evidence in this case is it not significant indeed that with the friendship of many years standing that existed between Fereva and his wife on the one side, and Urquhart on the other, Fereva should admittedly have remained absolutely silent on the subject when he met Urqpuhart until December 5, 1941, when he called at Urquhart's office in preparation for trial, and left immediately the same evening for Chico to report his alleged conversation to Mr. Hogle and Mr. Goldstein.

Alleged conversations that took place, one between Fereva and his wife in which he told her that he had already reported the loss to Urquhart (Tr. 349), and the other, the remark made after the termination of the proceedings on motion for new trial in the Dickinson case to Mr. Goldstein by Fereva at the court house in Auburn (Tr. 394-5), were properly given no weight.

The conversation between Fereva and his wife, and that between Fereva and Mr. Goldstein, were clearly hearsay and inadmissible. The rule as stated in

Nichols on Applied Evidence, Vol. 2, p. 1364, is as follows:

"*Of party with third person in absence of adverse party.* Conversations between a party and a third person in the absence of the opposing party are not admissible against the latter." Citing

" 'In an action for rent, conversations between plaintiff and the person who had formerly rented the premises to defendant, and between them and third persons, relative to rental thereof, are not admissible against defendant, who was not present at such conversations, and knew nothing about them.' "

Ambrose v. Hyde, 145 Cal. 555, 79 Pac. 64.

"Conversations, in the absence of plaintiff, between defendant and others, as to the purpose of a deed of plaintiff's land to defendant, were incompetent."

Bell v. Staacke, 141 Cal. 186, 74 Pac. 774;

Fee v. Wells, 65 Colo. 348, 176 Pac. 829;

Farmer v. Hughes, 38 Colo. 318, 88 Pac. 191;

Whitman v. McComas, 11 Idaho 564, 83 Pac. 604;

Wilson v. Vogeler, 10 Idaho 599, 79 Pac. 508;

Ferrat v. Adamson, 53 Mont. 172, 163 Pac. 112;

Kennedy v. Kennedy, 27 Nev. 152, 74 Pac. 7, 77 Pac. 597;

McNicol v. Collins, 30 Wash. 318, 70 Pac. 753.

Especially where self-serving declarations.

Hammett v. State, 42 Okla. 384, 141 Pac. 419, Ann. Cas. 1916D, 1148.

"So accused's wife's testimony as to a conversation with her husband, as to whose return home and matters connected therewith on the morning after the alleged crime she had testified, held incompetent and hearsay."

State v. Orcutt, 123 Wash. 651, 212 Pac. 1066.

Second: Carefully weighing the testimony of Fereva to the effect that he made the statement to Urquhart which appellants would have us believe constituted a notice to the plaintiff, several things are glaringly inconsistent with his position. He is flatly contradicted by Walter Henretty, and by Urquhart himself. The most convincing inference against him must be drawn from his failure to object to any one of the three letters (Tr. 166, 169, 171), reserving the plaintiff's rights and written him by Mr. Murray of the claims department. His conduct during the 60 days interval that elapsed before written notice was made out by him tends to disprove his contention. His whole conduct is not that of one who had been some 14 to 20 years an insurance agent and a garage and repair man, deriving a large proportion of his income from insurance companies.

Henretty's testimony is that Fereva's statement was taken down in shorthand by Henretty in Fereva's presence, and read as recorded. Henretty testified that he had a conversation with Fereva on April 26, 1940, as follows:

"A. Well, I asked him why he had not reported the matter, and pointed out it was more than two months, and asked him why he hadn't

done it. 'Well,' he said, 'the reason I did not report it was that I didn't feel it was of enough importance, and the highway patrol exonerated me completely.'

Mr. Scott. Q. What, if anything further, did Mr. Fereva say to you at that time upon that subject?

A. Well, there was no further elaboration of it. He might have repeated the same—I pointed out to him that it was going to be a serious handicap to have delayed it so long, and he might have repeated it—I didn't write that repetition down. He might have repeated that the officers had exonerated him is why he hadn't done anything about it." (Tr. 204-205.)

And on cross-examination he states:

"The Witness. I can recollect it, your Honor, I can remember the occasion quite well. I can remember the phraseology quite well. I don't have to refer to those notes.

Mr. Goldstein. Q. You say you remember it quite well?

A. Yes.

Q. And this converastion took place on the 26th day of April, 1940?

A. That is right.

Q. You have had dozens and dozens of accidents since that time that you have investigated, isn't that true?

A. Very probably.

Q. And you have been spoken to a great many times by people, witnesses, insureds, and other persons?

A. Very probably.

Q. And do you mean to say now you can recall and recite a conversation that you had with those

people on any particular day without referring to notes?

A. Maybe not, but this is different Mr. Goldstein.

Q. What impresses this on your mind?

A. I had a number of other conversations with Mr. Fereva on it. This very thought ran through this whole case, his failure to report the same, and the prejudice that arose. It came up time after time.

Q. Mr. Henretty, you were talking about a written report.

A. What do you mean, written report.

Q. To Mr. Fereva in this conversation. Weren't you talking about a written report?

A. No; any kind of notice whatsoever.

Q. Did you make any such statement to him?

A. What do you mean, did I make any such statement to him?

Mr. Goldstein. Strike that.

Q. Did you ask him whether he reported it at all to anybody?

A. No. He said he had not, and his reason was this:——

Q. Isn't it a fact that what you were talking about was a written report?

A. No.

Q. Isn't it a fact what you considered was prejudicial was the failure to file a written report?

A. No. What I figured was prejudicial was his failure to tell anybody about it. For example——

Q. Go ahead and finish your answer.

A. In working on the case we ran into different snags. People told us, 'Well, I can't remember. Why didn't you come to see us at the time?' Well, I didn't know about it. I told Mr.

Fereva several times, and he heard these people, some of them told me, 'Well, if you asked me earlier I might have remembered.' I said to him, 'There you see what happens by reason of not telling us about it. You should have told us in March.' " (Tr. 208-210.)

Against this is the denial of Fereva appearing at transcript pages 333-4:

"Q. Now, did he ask you anything as to why you did not file a written report? Do you remember any conversation regarding that?

A. Well, he asked something about if a report had been filed.

Q. What kind of a report was he talking about?

A. I presume he was referring to a written report.

Q. Did you tell him you had not filed a written report?

A. I believe I did, yes.

Q. Did you ever tell him you had not notified Mr. Urquhart personally, or orally?

A. No, I didn't.

Q. Did he ever ask you about that at all?

A. Yes; he asked me one question on that.

Q. What did you tell him, that is what I want to find out?

A. Well, he asked me why this wasn't reported —I can't quite place it. I said, 'Yes, it has been reported.' He said 'Why did't you report it again?' I said, 'I didn't think it was of enough importance, because the Highway Patrol exonerated me, and Mr. Urquhart had taken no further action with it, and that was the length of my report.'

Q. That was the sum and substance of your conversation with Mr. Henretty?

A. Yes, sir.

Q. And when he was talking to you was he referring to this written report?

A. I presume he was." (Tr. 333-4.)

We respectfully submit that the insurance background and experience had by the two parties to the conversation should be taken into consideration in scanning and weighing the evidence. What could be more amazing and ridiculous than Fereva's statement above "I said yes, it has been reported. He said 'Why didn't you report it again?' "

SIGNIFICANCE OF FAILURE TO MAKE DENIAL OR PROTEST LETTERS RESERVING COMPANY'S RIGHTS.

Another consideration weighing heavily against Fereva is his silence, his utter lack of any protest or objection to the company's letters setting forth the insurer's position and reserving rights, all three of which were sent to him by registered mail, namely, the letter of April 29, 1940 (Tr. 166-7), December 30, 1940 (Tr. 169), January 28, 1941. (Tr. 171.) The failure to reply to letters of this character and under these circumstances, supplies strong inferential evidence that the statements contained in the letters are true, the strength of the inference depending largely upon the question as to whether a reply thereto was or was not naturally to be expected under the circumstances. The rule is stated in

Simpson v. Bergmann, 125 Cal. App. 1, at p. 8, 13 Pac. (2d) 531,

as follows:

"While ordinarily the fact that a letter is received containing false statements does not impose upon the recipient the duty to reply thereto, nevertheless this depends upon the circumstances, and, as said by Mr. Wigmore, 'each case must stand upon its own facts'. (2 Wigmore Evidence, sec. 1073.) The test is found in whether the circumstances are such that in the ordinary practice of mankind the party receiving it would have answered it if he did not acquiesce in the statements it contained. (22 Cor. Jur., Evidence, sec. 364, p. 326.) The ground of admissibility, however, is not that the letter affords any proof that the statements therein are true, but that silence, when such statements are calculated to draw forth a reply, may be the ground for an inference that the statements are true. (Keeling-Easter Co. v. Dunning, 113 Me. 34, 92 Atl. 929; Ross v. Reynolds, 112 Me. 223, 91 Atl. 952.) Here the inference sought to be drawn was the existence of a contract; and the instances in which such letters have been admitted have usually been cases where they were part of a mutual correspondence or referred to an existing contract. (See notes, Ann. Cas. 1917D, 790; 8 A. L. R. 1163; 34 A. L. R. 560; 55 A. L. R. 460.)"

It is very true, as stated by the United States Supreme Court in

Leach & Co. v. Pierson, 275 U.S. 120, 72 Law. Ed. 194, 55 A. L. R. 457, 459:

"A man cannot make evidence for himself by writing a letter containing the statements that he

wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts. He no more can impose a duty to answer a charge than he can impose a duty to pay by sending goods. Therefore a failure to answer such adverse assertions in the absence of further circumstances making an answer requisite or natural has no effect as an admission."

Such an unanswered letter is admissible where it relates as here to an existing contract between the parties.

First National Bank v. Ford (Wyo.), 216 Pac. 691, 31 A. L. R. 1441.

And see cases collected in

8 *A. L. R.* 1166-7.

We find the rule set out in

22 *Corpus Juris, Title "Evidence"*, p. 322, sec. 357:

"Significance of Failure to Reply.—In General. The failure of a party to reply to a statement made in his presence or hearing is significant only where the nature of the statement, and the circumstances under which it was made, are such as to render a reply natural and proper. It is always competent to show silence or acquiescence of a party where the facts stated tend to expose him to the consequences of a criminal act, or would inflict a civil injury, or injuriously affect his title to real or personal property, or limit his right to recover damages for a serious injury, as under such circumstances it would be reasonable to expect a denial of the statement if it was not true."

And at page 326, section 364:

> "When Admissible. Notwithstanding the general rule just stated, there are circumstances under which unanswered letters are competent evidence of admission by acquiescence in the statements therein contained. The test of admissibility is found in whether the circumstances are such that in the ordinary practice of mankind the party receiving the letter would have answered it if he did not acquiesce in the statements contained therein."

See

Bend v. Forrest (C.C.A. 1), 213 Fed. 763, 765-6.

As pointed out in

22 *Corpus Juris* 327, sec. 367,

the probative force of failure to deny a statement depends on the circumstances:

> "Probative Force. Failure to deny a statement in a letter is merely a circumstance to be weighed in connection with other evidence bearing upon the correctness of the statement, and it has less probative force than would attach to a failure to reply to an oral statement made directly to the party."

Applying then the test suggested by the United States Supreme Court, supra, the background in this case was certainly one that renders the failure of Fereva to assert to anyone connected with the plaintiff company even the idea that he had given notice to Urquhart before April 26, 1940, and the failure to reply to any of these letters, of most decided significance. This failure should be taken into consideration

in arriving at a determination as to whether Fereva is or is not telling the truth.

Fereva had been in the automobile business for 14 years. (Tr. 173.) For over 10 years he had represented the plaintiff company. (Tr. 387.) Prior thereto he had represented other companies under Urquhart. He knew Urquhart personally, intimately. He was a "very particular friend". (Tr. 177-8.) He was in business with Urquhart for some years but connected with the plaintiff company at a time when Urquhart was agent for other companies. (Tr. 349-50.) He had been a guest at their home and an intimate friend whom they had known for 15 or 16 years. (Tr. 352.) He visited two or three times a month at Fereva's place of business. (Tr. 354.) Yet Mrs. Fereva never discussed the matter with Urquhart. (Tr. 354.) Urquhart testified he never heard of the accident until April 26th, sixty days following its occurrence. (Tr. 319-320.)

Mrs. Fereva testified that there was a total silence during the 60 days from the accident up to April 26th. (Tr. 353.) Fereva had represented the plaintiff, General Accident, for over 10 years, and remained its agent. (Tr. 381-385.) He had Urquhart's telephone number and no difficulty communicating with him. (Tr. 378.) He never told Urquhart that the letter of May 3rd, Exhibit 6, was a mistake. (Tr. 381.) In compliance with that letter he went to Mr. Gerald Desmond, who acted as his attorney, furnished under reservation of rights by the insurance carrier. Despite his friendliness with the plaintiff company itself, and

despite the fact that he was an agent, he never wrote the company calling attention to his claim that he notified Urquhart, and made no reply to the registered letters. (Tr. 373-4.) He knew it was important to have the insurance carrier check the damage to the Dickinson car, alleged to amount to $437.00, but never even told the company that he had it in his garage for 10 or 12 days. (Tr. 376-8.) He knew that inspection of the car was essential. He knew that it came under the damage feature of his policy. (Tr. 377.) The policy covered property damage, with limit of $5000. (Tr. 121.) He knew Henretty; had known him for years; knew his position as an investigator; but never communicated with him. (Tr. 323-4.)

Certainly there exist in this situation all of the elements creating a powerful inference that Fereva never made any such statement to Urquhart on April 26, 1940. He acted upon the letters sent by the company reserving its rights; he remained in frequent contact with Urquhart. His relations with Henretty he asserts were very close during the investigation and preparation for trial and upon the trial. It must be assumed that his relations with Mr. Gerald Desmond, his attorney, were close.

It is odd indeed that even after the plaintiff company notified him by letter dated January 28, 1941, that it withdrew from his defense and left him to his own resources, he still made no suggestion to the company or anybody representing the company, that he claimed he had given the required notice to Urquhart. And it appears from the record that the first time that

he mentioned his claim to any representative of the company was on the taking of his deposition in this action on May 10, 1941, at Sacramento. (Tr. 339-340.)

FEREVA'S CONDUCT INCONSISTENT WITH STATEMENTS.

Looking at the matter from another point of view, and endeavoring to weigh his statement in the light of his conduct, Fereva was an active insurance agent, and as we have pointed out a fairly substantial portion of his business as a garage and repair man was derived from payments by insurance companies for damage done to this and that and the other car. (Tr. 376.) It was quite natural for him to have a repair job and have it paid for by one or another insurance company. He knew it was one of the most essential elements where insurance was involved that there should be an inspection of the car. As an insurance man, repair and garage man, he had for many years been accustomed to that phase of the business. In this case he knew that the Dickinson car if damaged by his negligence came under his policy. (Tr. 376.) He knew that it was highly important to have the insurance carrier check to ascertain the damage. "We might say that is elemental in your business isn't it? A. Yes." (Tr. 377.) Yet he left that car in his garage without its being checked by any representative of the carrier for 10 or 12 days, and then delivered it back to Dickinson.

The same was true with reference to his own automobile or tow car, which he repaired with speed.

The same was true as to the highway conditions, the marks that were made in the muddy ground and obliterated by weather conditions. (Tr. 389.)

His tow car was repaired in from 5 to 12 days. (Tr. 390.) It did not occur to him to notify the company about either of these cars. (Tr. 390.)

All of these things, essential to the ascertainment of truth by the carrier, the importance of which he frankly admits, were not brought to its attention. In fact he says:

> "Q. And knew Mr. Henretty, and knew Mr. Henretty almost as long as Mr. Urquhart?
>
> A. Not personally, no. I never knew Mr. Henretty personally.
>
> Q. You knew him as the trouble man, investigating and all that?
>
> A. Yes, sir.
>
> Q. Now then, in spite of your close relationship with Urquhart and with the company, or with Wentz & Erlin, it never occurred to you, did it, to call the company's attention further, or Urquhart's attention, or the attention of Mr. Wentz, the attention of Mr. Henretty, or anybody else, to your alleged conversation had in front of your garage?
>
> A. Not unless I talked it over wtih Mr. Urquhart in my place of business." (Tr. 384-385.)

Finally we respectfully urge that giving Fereva the benefit of every possible doubt in this case it yet remains clear that he did not even give Urquhart an oral notice that would fulfill the requirements of condition 7 of the policy, to-wit:

"Notice of Accident—Claim or Suit. Upon the occurrence of an accident written notice shall be given by or on behalf of the insured to the corporation or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses. * * *"

Purefoy v. Pacific Auto Indemnity Exchange, 5 Cal. (2d) 81, 88, 53 Pac. (2d) 155;

Appleman's Work, Automobile Liability Insurance, p. 225;

Cooley's Briefs on Insurance, Vol. 7, Second Edition, at page 5888,

points out

"When, however, there is a plain requirement for 'full particulars' of the accident or death, it cannot be entirely ignored."

And cites in support of the rule the following:

Standard Accident Ins. Co. v. Strong, 13 Ind. App. 315, 41 N. E. 604;

Stephenson v. Bankers' Life Ass'n, 108 Iowa 637, 79 N. W. 459.

"Though any succinct and intelligent statement, giving the information called for in a provision of the policy requiring notice, is sufficient to put the insurer upon inquiry, to determine whether he is liable, the beneficiary of an accident policy must, where she was convinced that insured was dead as a result of accident, but did not know of the manner of his death, give notice

in accordance with the stipulation that claimant must deliver immediate written notice of any accident with full particulars. Tuttle v. Pacific Mut. Life Ins. Co., 58 Mont. 121, 190 P. 993, 16 A. L. R. 601."

To the same effect is

Aronson v. Frankford Accident and Plate Glass Ins. Co., 9 Cal. App. 473, 99 Pac. 537.

As we have pointed out, according to his testimony Fereva fully understood the importance of notice and yet the only remark made by him to the deaf man, Urquhart, is found in transcript pages 328-9:

"Bob, I want to report a little crackup I had down the highway the other morning with my tow car." I said, "I was called out in the morning to go out to pull a car out of the ditch, and while I was towing the car out of the ditch another car ran into the car we were towing out. There were several people injured; they were scratched and bruised, but nothing serious."

Time and again Fereva protests that that was the extent of his conversation, and that he was interrupted and "left Urquhart standing in front of the building, to wait on customers". (Tr. 338-9.)

He gave no reasonable information respecting the time of the accident.

Then Fereva continues:

"Mr. Scott. Q. You didn't tell him where the accident happened?

A. Why, nothing more than 'down the highway'.

Q. You didn't even tell him what highway, did you?

A. I don't remember telling him between Lincoln and Roseville; but we were interrupted, that is why. We just got into our conversation and it was interrupted.

Q. You told him, 'Just the other day I had a little crackup down the highway with the tow car'?

A. Yes, sir.

Q. You didn't tell him down what highway?

A. Probably not.

Q. You didn't tell him anything but just what I asked you, namely, this: 'Bob, I had a little crackup down the highway with the tow car the other morning. We had a call to tow a car out of the ditch, and while we were towing them out a car ran into the car which was being towed. There was quite a little crackup, and they were cut and bruised, but nothing serious.' Now, that is all you told him?

A. Probably." (Tr. pp. 339-340.)

In other words he gave no reasonable clue either as to time or place of the accident.

Fereva and Campbell took the two Dickinsons and Kemp to the hospital for medical treatment. Yet he did not give Urquhart the "names and addresses of the injured". The record discloses that there were witnesses available. There was Campbell, his foreman; there were at least two police officers and the physicians who attended the injured, and "several" others. (Tr. p. 335.) And yet he gave neither the name nor the address of any one of these witnesses.

He said nothing whatever respecting the circumstances of the accident, and what he did say about the character of the injuries was "They were cut and bruised but nothing serious".

The complaint in the Dickinson case against him, and the verdict returned thereunder, proves this to have been utterly untrue as the injuries to Mrs. Dickinson were serious. And the complaint in the Kemp case indicates that his injuries were allegedly at least more serious than those of the Dickinsons. There was also damage to Kemp's car coming within the $5000 property coverage of the policy. (Tr. 121.)

Taking Fereva's testimony at par, to use the stock market colloquialism, and assuming that he uttered the remarks he says he did, to this very deaf man, still those remarks were not a substantial or attempted compliance with the requirements of condition 7. Tested by the rule in the *Purefoy* case, supra, and the other authorities just cited, his remarks were in no sense a compliance with the condition, and would not have constituted the notice required under the policy of insurance even had Urquhart heard the remarks and reported them to the plaintiff company.

A long line of decisions has established the rule in California that the test as to whether an agent has power to bind the company by his knowledge or his acts is whether or not such agent is one clothed with authority to consummate a contract of insurance. Under this rule clearly Urquhart was not an agent of the company.

We respectfully refer to the following cases:

Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 Pac. 51;

Kruger v. Fire & Marine Ins. Co., 72 Cal. 91, 13 Pac. 156;

Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667;

Farnum v. Phoenix Ins. Co., 83 Cal. 246, 23 Pac. 869;

Bayley v. Employers' Liab. Assur. Corp., 125 Cal. 345, 58 Pac. 7;

Allen v. Home Ins. Co., 133 Cal. 29, 65 Pac. 138;

Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N.S.) 866;

Raulet v. Northwestern etc. Ins. Co., 157 Cal. 213, 107 Pac. 292;

Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 89 Pac. 102;

Northern Assurance Co. v. Grand View B. A., 183 U. S. 300, 46 Law. Ed. 213;

Stipcich v. Metropolitan Life Ins. Co., 8 Fed. (2d) 285, 286-7;

Odergard v. General Casualty and Surety Co., 44 Fed. (2d) 31.

GIVING OF NOTICE NOT WAIVED.

We respectfully submit that in this case the giving of notice by Fereva, the insured, as required by condition 7 of the policy, within the period set by the

policy, and by section 551 of the Insurance Code, was not waived. Fereva was the insured under the policy here in question. Fereva was also a *soliciting* agent of the plaintiff corporation, duly licensed as such by the Insurance Department of the State of California. His appointment and certificate are in evidence. (Plaintiff's Exhibit 4 and Defendants' Exhibit B.) However, with respect to the policy of insurance under which he was the insured his duties were entirely regulated by the terms of the policy. His knowledge of his own accident was not imputed to the plaintiff corporation by reason of the fact that he was its agent. This point is discussed and determined in

Utica Sanitary Milk Co. v. Casualty Co. of America, 210 N.Y. 399, 104 N.E. 918.

Gilmore v. Eureka Casualty Co., 123 Cal. App. 20, 27, 10 Pac. (2d) 810,

a case in which Gilmore was the agent of the defendant casualty company, and at the same time "wrote the said policy of insurance for his own benefit", he being the actual owner of the automobile and in possession thereof at the time he as general agent executed the contract of insurance in the name of another insured. The court held:

> "Appellant was the general agent of respondent and really wrote the policy for his own benefit. He had knowledge of the true facts of the transactions which he did not communicate to his principal. A general agent who in effect writes a policy of insurance protecting himself against loss should not be permitted to recover against his principal on the policy where he has knowl-

edge that material representations made in the policy are untrue and does not communicate such knowledge to his principal."

It is a sound principle of law that no oral agreement made before or contemporaneously with the written contract could be effectual to vary the provisions of the insurance policy.

A very celebrated case on this subject is found in

Lumber Underwriters v. Rife, 237 U.S. 605, 609, 35 S. Ct. 717, 59 L. Ed. 1140.

The defendant Fereva cannot contend that irrespective of the policy contract some agreement or understanding existed with reference to himself as a favored insured that he was not to be called upon to give written notice of accident, or to give notice containing substantially the items of information called for by condition 7 of the policy.

This rule is followed by the Circuit Court of Appeals, Ninth Circuit, in the case of

Eddy v. National Union Indemnity Co., 78 Fed. (2d) 545. See this case on rehearing in 80 Fed. (2d) 284, Judge Wilbur speaking for the court.

See

Lumber Underwriters v. Rife, 237 U.S. 605, 609, 35 S. Ct. 717, 59 L. Ed. 1140,

in which case Justice Holmes adds as a conclusion at page 610:

"Of course, if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity.

> What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause."

This has always been the law in the State of California. See

Madsen v. Maryland Casualty Company, 168 Cal. 204, 142 Pac. 51,

which expressly applies the federal rule as the same is found in

Connor v. Manchester, 130 Fed. 743, 70 L. R. A. 106;

Gladstone v. Columbia Life etc. Co., 33 Cal. App. 119, 164 Pac. 416,

which cites and applies the rule as found in the federal case of

New York Life Insurance Co. v. Fletcher, 117 U. S. 519, 29 Law. Ed. 934.

On the point that the payment of one loss under a policy does not operate as an agreement to pay a second different loss, or constitute a waiver so far as the second loss was concerned, see

Northwestern National Insurance Co. v. McFarlane (C. C. A. 9), 50 Fed. (2d) 539.

We also refer to

Coleman Furniture Corporation v. Home Insurance Co., 4 Fed. Supp. 794,

wherein a waiver made with respect to one breach of the policy did not extend to any subsequent breaches.

The testimony shows Urquhart was not a soliciting agent; that he was not an employee of the plaintiff corporation; that he was a special agent appointed by Wentz & Erlin, with limited authority. As such he came under the provisions of

Sec. 1640 of the California Insurance Code, which provides that "Article 1" dealing with "agents', brokers', and solicitors' qualifications" does not affect the following:

> "(g) Persons whose employment does not include the solicitation, negotiation, or effecting of contracts of insurance and who do not sign policies or other evidences of insurance.
>
> "(h) Salaried traveling employees or officers of insurers of the type commonly known as special agents, while performing duties and exercising functions such as are commonly performed by special agents, if such persons:
>
> (1) Do not effect insurance.
>
> (2) Solicit or negotiate insurance only as a part of and in connection with the business of an insurance agent licensed under this chapter."

Furthermore Mr. Urquhart was not licensed by the plaintiff corporation as its agent. We submit the rule expressed by the California Supreme Court applies:

> "Whether a particular agent has power to waive conditions is a question of fact. Plaintiffs offer no evidence as to the authority of Hawes except the policy, which expressly denied to him the authority to modify the contract. The burden was upon plaintiff."
>
> *Westerfeld v. New York Life Insurance Co.*, 129 Cal. 68, 61 Pac. 667.

In fact this situation is stronger because Urquhart was not even "a particular agent". He was doing special work for Wentz & Erlin. He was not an agent of the plaintiff at all.

We also refer to the case of

Moriarty v. California Western States Life Ins. Co., 22 Cal. App. (2d) 260, 70 Pac. (2d) 684,

wherein it was held even in the case where an agency was shown that an estoppel cannot be predicated upon a transaction with an agent of an insurer where there is no evidence to show that the agent had authority to waive any provision of the policy, and there was much evidence that he had no authority to change the policy. In that case a directed verdict was rendered, the court holding that there was nothing to show that Benjamin, the agent, had any authority on behalf of the insurance carrier to waive any provision of the policy. (See 22 Cal. App. (2d) p. 268.)

Fereva related how he as an agent had given word of the happening of accidents in which the cars of *various policyholders* were involved. And he told how the plaintiff corporation's organization handled all of these matters expeditiously on receipt of notice. Emphasis was placed repeatedly upon the fact that *he* had not signed written notices in these instances. No one expected an agent to do so. And when it comes to a careful analysis and checkup of the instances testified to by him it is revealed that in no case whatever, with possibly one exception, was he the *insured* under the policy or making any report other than with reference to accidents in which the cars of his "clients" were involved.

What force then is to be attached to his admission:

"Q. Did you ever file a written report to Mr. Urquhart?

A. I don't know of any; *very few* if any." (Tr. 332.)

Our California courts have held that indulgence extended one party to a contract by the other does not constitute a waiver. Even had plaintiff in one or more instances not insisted on a written report from Fereva (assuming one to have been forthcoming from him as an *insured*) this would not have constituted a waiver of written notice under condition 7 excusing notice of subsequent accidents on later and different policies.

Kerns v. McKean, 65 Cal. 411, at 416, 4 Pac. 404.

Nowhere in the whole record is there any evidence that anyone connected with the plaintiff corporation assured him that condition 7 was meaningless, or that he or any other policyholder was not expected to comply with it. As pointed out by our California courts compliance with this requirement of the policy is of the very essence of the insurance contract, and noncompliance therewith is prejudicial as a matter of law.

Distributors Packing Company v. Pacific Indemnity Co., 21 Cal. App. (2d) 505, 508, 70 Pac. (2d) 253.

It must be remembered that to establish a waiver the burden of proof is upon the party claiming a

waiver to prove it by such evidence as does not leave the matter doubtful or uncertain.

Aronson v. Frankford Accident and Plate Glass Ins. Co., 9 Cal. App. 473, 99 Pac. 537.

This case is in some points similar to

Alexander v. General Ins. Co. of America, 22 Fed. Supp. 157.

The well considered California case of

Sharman v. Continental Ins. Co., 167 Cal. 117, 138 Pac. 708, 52 L. R. A. (N.S.) 670,

clearly defines the extent of the authority of the agent required to be established to enable him to waive conditions of the policy.

Urquhart had no such extensive authority. Urquhart was not even a soliciting agent for the plaintiff corporation; he was merely local representative at Sacramento for the firm of Wentz & Erlin, and within the category enumerated in the Insurance Code, section 1640, subdivisions g, h-1 and 2.

The importance of compliance with condition 7 of the insurance policy is pointed out in numerous California cases, of which

Purefoy v. Pacific Auto Indemnity Exchange, 5 Cal. (2d) 81, 53 Pac. (2d) 155

is an example.

An excellent statement of the reason for the requirement is found in

Travelers' Insurance Co. v. Myers, 62 Ohio St. 529, 57 N. E. 458, 459.

And we also refer to

Lewis v. Commercial Casualty Ins. Co., 142 Md. 472, 121 Atl. 259.

Appellee respectfully submits that this cause was properly within the equity jurisdiction of the District Court; that the treatment of the verdicts as merely advisory verdicts was proper, not only because it was a suit in equity but because equity jurisdiction attached by reason of the filing of cross-claims based on equitable grounds; that furthermore defendants are estopped from attacking the action of the court which resulted from defendants' motion for findings and judgment; that the findings of the court that no notice whatever was given to the plaintiff Insurance Company by Fereva prior to 60 days after the happening of the accident is amply supported by the evidence; that with that finding the charges of waiver and estoppel fall; that the court properly proceeded to final judgment particularly because it was conceded by all the defendants that Fereva gave no notice in writing as required by condition 7 of the policy prior to the expiration of said period, and that it was also conceded that the handling of the defense of the actions in the state court was under full reservation of rights made by letters sent to Fereva by registered mail.

We respectfully submit that the judgment of the court should be sustained.

Dated, San Francisco,
March 20, 1944.

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